IN THE COURT OF APPELS
STATE OF ARIZONA
DIVISION ONE

RAMON CANO,	) No. 1 CA-IC 08-0022
Petitioner	)
	) Department C
v.	)
THE INDUSTRIAL COMISSION OF ARIZONA,	) ICA NO. 20070-320056
Respondent,	) CARRIER NO. WC-608000000.
HANSON AGGREGES OF AZ,	)
Respondent Employer,	)
LIBERTY MUTUAL INSURANCE CO,	) Order
Respondent Carrier.	)

The above-mentioned matter was due to submitted to the court. The court has this day rendered its Memorandum Decision.

It is ordered that the Memorandum Decision be filled by the Clerk.

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHERIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111 (c); ARCAP 28 (c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPELS
STATE OF ARIZONA
DIVISION ONE

RAMON CANO,	) 1 CA-IC 08-0022
Petitioner	)
	) Department C
v.	)
	) MERMORANDUM
THE INDUSTRIAL COMISSION OF ARIZONA,	) DECISION) (Not for Publication) Rule 28, ARCAP)
Respondent,	)
HANSON AGGREGES OF AZ,	)
	) Respondent
Employer,	)
LIBERTY MUTUAL INSURANCE CO,	)
Respondent Carrier.	)

Special Action—Industrial Commission

ICA CLAIM NO. 20070-320056

CARRIER NO. WC-608000000

James A. Overholt, Administrative Law Judge

AWARD AFFIRMED

Ramon Cano — Phoenix
In Propria persona

Laura L. McGrory, chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent
Cross & Lieberman, P.A>
By Lawrence H. Lierberman
Attorneys for Respondent Employer and Carrier

WINTHROP, Presiding Judge

¶1 Petitioner Ramon Cano ("Claimant") seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review of non-compensability for his back condition (ruptured disc) that ultimately required surgery.

Claimant argues on appeal that there was insufficient evidence to support the Administrative Law Judge's ("ALJ") findings that the evidence failed to establish that Claimant sustained an injury arising out of and in the course of employment. For the following reasons, we affirm the award and decision upon review.

JURITICTION AND STANDARD OF REVIEW

¶2 This court has jurisfiction pursuant to Arizona Revised Statues ("A.R.S." sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for special actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. Young v. Indus. Comm'n 204 Ariz. 267, 270, ¶ 14, 63 p.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding this award. Lovich v. Indus. Comm'n, 202 Ariz. 102, 105, ¶ 16, 41 p 3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶3 At the time of this alleged injury, Claimant had worked for the respondent employer, Hanson Aggregates Az, Inc. ("Hanson"), for approximately sixteen years[1]. Claimant worked as a crusher operator during his last few years at Hanson[2]. On June 19, 2006, Hanson terminated Claimant's employment based on its review of Claimant's work history.

¶4 Due to his complaints of low-back pain and a numb leg, Claimant contacted the Arizona Health Care Cost Containment System on September 1, 2006. Since Claimant could not obtain an appointment, he sought treatment from a private doctor. In December, Dr. Ricardo Celeya examined Claiment, ordered a MRI scan, and referred Claimant to Dr.Glen Bair, an orthopedic specialist.

¶5 On January 11, 2007, Dr. Bair examined Claimant. Dr Bair noted in the "history" of illness section of his report that Claimant has developed severe left leg pain associated with his work. Dr Bair also stated that the MRI report indicated that

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[1] The worker's report of injury originally noted Claimant's date of injury as August 30, 2006; however, an order nunc pro tunc corrected the date of injury to June 19, 2006.

[2] A crusher operator is a mainly sedentary job where the operator uses a control panel in a tower; however, at times, it requires the operator to exit the tower and engage in heavy work on the plant's floor.

Claimant had "an extruded fragment at (the L4-5 level) with caudal migration with moderate canal stenosis and some exit foraminal encroachment." Dr Bair concluded Claimant had sciatic pain secondary to extruded fragments at the L4-5 level. On May 31, 2007, Claimant underwent surgery performed by Dr. Edward Song, an orthopedic spinal specialist.

¶ 6 On January 22, 2007, Claimant filed a worker's report of injury. The carrier issued a notice of claim status denying the claim, and Claimant filed a request for hearing with the ICA, arguing that his back "condition (was) related to the repetitive work activity he performed for (Hanson) prior to his termination."

¶ 7 On August 8, 2007, Dr Terry McLean, an orthopedic surgeon with fellowship training in Spinal surgery, performed an evaluation on Claimant at the request of Hanson and its insurance carrier. That evaluation consisted of a review of all prior relevant medical and surgical records, including radiology studies, and physical examination of Claimant. As a result of the evaluation, Dr. McLean diagnosed Claimant with a lumbar disc herniation at the L4-5 level, radiculopathy at the L5 level, and multilevel lumbar degenerative disc disease. Dr McLean also concluded that, to a reasonable degree of medical probability neither the underlying condition nor the need for the corrective surgery was caused or contributed to by Claimant's work activity with Hanson.

¶8 After hearing testimony at four scheduled hearings, the ALJ entered an award denying Claimant's claim of gradual industrial injury. Claimant timely requested administrated review, and the ALJ summarily affirmed his award. Claimant next brought this appeal.

DISCUSSION

¶9 Claimant first agues that the ALJ erred in its findings that the Claimant was employed as a mostly sedentary crusher operator by Hanson on the relevant dates. Claimant contends his back problems was gradual injury that occurred over time and that his entire work history with Hanson shows substantial strenuous physical labor which contributed to deterioration of his back condition. Claimant requests that we "review the case and explore" the sufficiency of the findings of the ALJ. "It is the duty ofS the (ALJ) to resolve all conflicts in the evidence and to draw inferences from that evidence. When more that one inference may be drawn, the (ALJ) may choose either, and will not reject that choice unless is wholly unreasonable." Johnson Manley Lumber v. Indus. Comm'n 159 Ariz. 10, 13, 764 p.2d 745, 748 (App. 1998) (citation omitted).

¶ 10 We acknowledge Claimant's argument that the record contains evidence that he engaged in more heavy lifting during the course of his employment than Hanson portrayed. At the scheduled hearing on October 26, 2007, Claimant testified that over the past sixteen years, he worked as a crusher operator, a loaded operator, a whole truck operator, and engaged in several repair in maintenance activities. Claimant further testified that every day he engaged in "heavy physical work," that consisted of bending over and picking up rocks with his hands or a shovel for more than an hour at a time. All of that work, per Claimant, led to his experiencing back pain while employed as a crusher operator in 2006; however, Claimant did not file an official injury report with Hanson because he thought that his back pain was caused by "tired muscles" after working approximately 50 hour work weeks. Claimant testified, however, that he did tell, Todd Hall, Claimant's supervisor, about his back pain.

¶11 Jim Schroeder, an area manager, testified on behalf of Hanson. Mr. Schroeder testified that the main functions of Claimant's job as a crusher operator consisted of walking around the plant to make sure that there are no dangerous conditions and using a push-button panel in the operator's tower to start and stop the conveyor belts and crusher. In the event that a conveyor belt or crusher stopped working, Claimant would exit tower to shovel and lift rocks obstructing the machines normal operation. These shoveling and maintenance activities might account for approximately 2.5 hours of Claimant's day; however, stoppages requiring Claimant to leave the tower did not occur every day. Mr. Schroeder testified that Claimant never reported an Industrial injury.

Finally, Mr. Schroeder also testified that numerous employees complained about Claimant, and Hanson decided to terminate Claimant's employment base in his poor job performance.

¶12 The ALJ recognized the conflict in testimony between Claimant and Mr Schroeder, and resolved the conflict against Claimant.

¶13 Conflicting evidence was also presented by the two expert witness, If there is a conflict in expect testimony, it is the responsibility of the ALJ to resolve that conflict. Stainless Specialty Mfg. Co. v. Indus. Comm'n, 144 Ariz. 12, 19, 695 p.2d 261, 268 (1985). Further as mentioned above, "(w)e will not disturb the resolution of the (ALJ) unless it is wholly unreasonable." Id. At 19, 695 p.2d at 268; see also Johnson Manley Lumber, 159 Ariz. At 13, 764 p.2d at 748.

¶14 Here, Dr Bair testified that the Claimant has underlying degenerative disc disease in his back, and opined that, to a reasonable degree of medical probability, Claimant's work activities contributed to an exacerbated his degenerative disc disease. Dr. Bair acknowledged that he sees doctors, accountants, and others that have sedentary occupations with similar findings of degenerative disc disease. Regardless, Dr. Bair opined that Claimant's extruded disc likely existed in August or September of 2006, and that a normal disc would not rupture unless there is "(some) extreme force" exerted.

¶15 Conversely, Dr. McLean testified that it is his opinion to a reasonable medical probability that the Climant's work activities at Hanson did not alter the course of Claimant's preexisting multilevel lumbar degenerative disc disease. Dr. McLean, focused, in part, on the fact that the Claimant did not seek medical attention until December 14, 2006, and did not claim the existence of a work-related injury until January 22, 2007. The doctor further opined that if Claimant sustained a herniated disc at the L4-5 level while engaged in a work-related activity, as Dr Bair suggested, Claimant would have immediately experienced symptoms and would have likely not only reported them to Hanson, but also sought immediate medical attention. As Mr. Shroder testified, Claimant never reported an injury while working at Hanson. Further, even though such injury of necessity would have had to occur before June 19 in order to be work-related, Claimant did not initiates any request for medical evaluation before September (at the earliest) or December (at the latest).

¶16 Based on the conflicting medical testimony, it was not unreasonable for the ALJ to adopt Dr. McLean's opinion. We therefore concluded that there was substantial evidence to support the ALJ's findings that the Claimant's back condition was not related to a compensable industrial injury. See Price, v. Indus. Comm'n 23 Ariz. App. 1, 4, 529 p.2d 1210, 1213 (1975) ("A))n appellate court will affirm an award of the Industrial Commission when there is substantial evidence to support the Commission's decision.").

CONCLUSION

¶17 For the reasons set forth above, we affirm the ALJ's award and decision upon review.

"s/"

LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:
"s/"

PATRICK IRVINE, Judge

"s/"

PHILIP HALL, Judge

Supreme Court
STATE OF ARIZONA

402 Arizona State Courts Building
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Phoenix, Arizona 85007-3231

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March 23, 2009

RE: CANO v ICA/HANSON AGGREGATES OF AZ/LIBERTY MUTUAL

Arizona Supreme Court No. CV-08-0395-PR
Court of Appeals Division One No. 1-CA-IC 08-0022
Industrial Commission of Arizona No. 20070-320056
Insurance Carrier No. WC-608000000

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 23, 2009, in regard to the above reference cause:

ORDERED: Petition for review by the Supreme Court = DENIED.

A panel composed of Vice Chief Justice Berch, Justice Ryan, and Justice Bales participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 23rd day to March, 2009.

Rachelle M. Resnick, Clerk

TO:
Ramon Cano
Laura L McGrory, Director, Industrial Commission of Arizona, Phoenix office
Lawrance H Lieberman, Cross & Lieberman PA
West Publishing Company
Lexis Nexis
Philip G Urry, clerk, Court of Appeals, Division One, Phoenix
mjl

1-19-99

To whom it may concern,

I have worked with Ramon for eight years. He has always impressed me with his work ethic and effort. He is a great example of a first generation immigrant. Hard work above and beyond any typical employee.

Ramon is responsible for the care and maintenance of our Deer Valley Redi-Mix plant. He is consciencious – very reliable.
He works an average of 65-70 hrs per week.

Also I would like to say I trust Ramon-no only with the amount of manies on premises, but with the safety of our drivers and the equipment of operators, he is directly responsible and Im confident in his abilities and personal concern. We here at Pioneer are lucky to have him. He represents the best of our working force.

Sincerely "s/"